Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996	)	MM Docket No. 97-247

To the Commission:

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The Office of Communication Inc., of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project ("UCC, *et al.*") respectfully reply to the oppositions filed by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (NAB/MSTV) and the Association of Local Television Service (ALTV) to UCC, *et al.*'s *Petition for Reconsideration* of the Commission's *Report and Order*, FCC No. 98-303 (released November 19, 1998).

Try as they might, the opposing parties cannot avoid the plain language of Section 336(e) of the Telecommunications Act of 1996 - digital television services like home shopping programming are indubitably programming "for which the licensee directly or indirectly receives compensation from a third party...." 47 §336(e)(1)(B). They have also failed to make the case that home shopping and like programming are "commercial advertisements" that are exempt from the fee. The Commission and Congress have consistently considered home shopping programming distinct from commercial advertisements.

I. THE PLAIN LANGUAGE OF SECTION 336(e) REQUIRES THE COMMISSION TO IMPOSE A FEE ON HOME SHOPPING, INFOMERCIAL AND DIRECT MARKETING SERVICES.

Section 336(e) plainly and unambiguously requires the Commission to impose fees on two

different kinds of ancillary or supplementary services. They are:

> (A) for which the payment of a subscription fee is required in order to receive such services or
> (B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required)

47 USC §336(e)(1).

Despite this clear and dispositive language, NAB/MSTV rely on the 1996 Act's House Report for their claim that Congress did not intend to include home shopping and like programming as feeable services under Section 336(e). The Report states that a feeable service is one for which "compensation fees apart from commercial advertisements ***are required in order to receive such services.***" H. Rep. No. 204, 104th Cong., 1st Sess. 117 (1995) [emphasis added]. This language, NAB/MSTV argue, requires that feeable services "must not only be supported by non-advertising revenue, but the receipt of that revenue must be required as a condition of the viewer obtaining the service in the first place." NAB/MSTV Opp. at 2 *quoting* NAB/MSTV Reply Comments at 5. Based on this House Report language, and with no reference to specific statutory language, NAB/MSTV conclude that

> [n]othing in the language or legislative history of the Telecommunications Act bespeaks any Congressional intent to impose fees on advertiser supported services which are offered to the public without subscription. Instead, Congress' unmistakable directive was to collect fees from broadcasters which offer subscription or common-carrier like services over digital television channels, service that would compete with providers of similar services who obtained spectrum at auction.

NAB/MSTV Opp. at 5.

This conclusion is altogether flawed. First and foremost, the House Report cannot override the express language of the statute, which reflects the intent of the ***entire*** Congress. The language of the statute says that when a third party pays a broadcaster to broadcast a digital TV

service, that compensation is feeable, unless that service is a commercial advertisement which supports free broadcasting. *See* 47 USC §336(e)(1)(B). This aside, the House Report language does not stand for what NAB/MSTV says, and in fact is entirely consistent with the statute. Broadcasters do not broadcast home shopping programming for free. They demand and receive compensation, so such revenue is indeed "required as a condition of the viewer obtaining the service...." The House Report is entirely consistent with the statutory language, since neither says that the compensation "required in order to receive such service" has to come from viewers' pockets. The statute only says that the compensation has to come from "a third party."

The core of NAB/MSTV's argument is that Congress intended only to impose fees on subscription services, but that interpretation is completely at odds with the plain language of the law.[1] Section 336(e)(1)(A) requires fees on ancillary or supplementary services "for which the payment of a subscription fee is required in order to receive such services." But nothing in that section or elsewhere in the Act limits the feeable services in Section 336(e)(1)(B), *i.e.*, those "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party" to subscription services. If that were the case, Section 336(e)(1)(B) would be unnecessary, as Section 336(e)(1)(A) encompasses all subscription services. Nor is there any indication in the plain language and legislative history that, as NAB/MSTV assert, the services in Section 336(e)(1)(B) are limited to "common carrier-like services...."

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[1]NAB/MSTV also appear to contradict themselves on that point. They first argue that Congress intended to impose fees only on subscription services. But in the very next sentence, they admit that Congress intended to place fees on services that go beyond subscription services, *i.e.*, "common-carrier" like services over digital television channels."

ALTV takes a different tack, arguing that Section 336(e) does not ***define*** what constitutes ancillary and supplementary services, but instead "limit[s] and qualif[ies] the types of ancillary and supplementary services which are to be subject to fees." ALTV Opp. at 4 [emphasis in original]. It points to Section 73.624(c) of the Commission's regulations which states that "no video broadcast signal provided at no direct charge to viewers shall be considered ancillary or supplementary." 47 CFR §73.624(c). This, it says, means that home shopping programming, provided without charge to the viewer, cannot be ancillary or supplementary regardless of whether a third party compensates a broadcaster for carriage.

The problem with ALTV's argument is that the Commission itself does not read 47 CFR §73.624(c) so broadly as to exclude from the definition of ancillary or supplementary every service provided in conjunction with a free video signal. Actually, what the Commission found was that feeable ancillary or supplementary services may indeed be an element of a free over-the-air service. The Commission stated that:

> We recognize, of course, that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or with other non-feeable ancillary or supplementary services.

Report and Order at ¶7.

It is especially noteworthy that, in neither the *Report and Order* nor the *Notice of Proposed Rulemaking* that preceded it, does the Commission cite, much less discuss, 47 CFR 73.624(c) for the proposition that all services broadcast on a nonsubscription video signal are automatically exempt from fees. Indeed, such a reading would likely run afoul of the plain language of the Section 336(e), which plainly brings nonsubscription services into the realm of feeable ancillary or supplementary services. *See* discussion at 2-3, above.

II. HOME SHOPPING AND LIKE SERVICES ARE NOT COMMERCIAL ADVERTISEMENTS EXEMPT FROM FEES.

NAB/MSTV mischaracterize the Commission's decision, claiming that the agency found only that "home shopping channels and infomercials are free, over-the-air television services, supported by commercial advertisements." NAB/MSTV Opp. at 3, *quoting Report and Order* at ¶40. They argue from this flawed premise that the Commission has never "treated infomercials and other-non-traditional advertisements as both advertising and programming." NAB/MSTV Opp. at 3.

The NAB/MSTV premise is wrong. The passage they quote is immediately preceded by a sentence which entirely negates the reading they propose. The language omitted says that: "home shopping and infomercials are commercial advertisements, excluded by the statute from the scope of ancillary and supplementary services...." *Report and Order* at ¶40.[2]

But even assuming *arguendo* that the NAB has correctly interpreted the *Report and Order*, this reading would still support UCC, *et al.*'s position. Under the plain language of the law, when a third party pays a broadcaster to carry any digital service, that service is exempt from fees only when the service ***itself*** is a "commercial advertisement used to support broadcasting...." 47 USC §336(e). The law makes no such exemption for digital services for which a broadcaster is paid by a third party, regardless of whether those services are also supported by commercial advertisements.

NAB/MSTV argue further that the Commission does not distinguish between programming

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[2]NAB/MSTV contradict themselves in this regard. One page earlier, NAB/MSTV state that "[t]he Commission found that home shopping and infomercial programs were not within the scope of the fee requirement because they are commercial advertisements,...." NAB/MSTV Opp. at 2.

and advertising, yet they quote a case in which the Commission refers to home shopping and the like as "commercial programming." NAB/MSTV at Opp. 3. ALTV makes a similar argument - that home shopping is both programming and advertising. ALTV Opp. at 3-4. Neither the Commission nor Congress has ever considered home shopping services to be advertising. *See* UCC, *et al. Petition for Reconsideration* at 6-10. Instead, it has variously considered it to be a service, program or format, albeit a "commercial" one. *Id.*[3] The cases which ALTV cites ALTV Opp. at 3-4, do not hold otherwise, and in any event were decided long before home shopping programming came into existence.

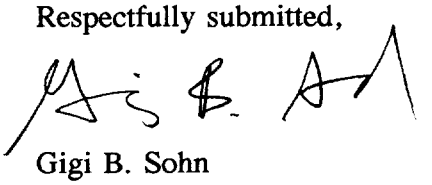
CONCLUSION

Wherefore, the Commission should grant UCC, et al.'s Petition for Reconsideration, and find that home shopping, infomercial and direct marketing programming are feeable services un-

[3]Contrary to what NAB/MSTV may believe, UCC, *et al.* and its counsel have always maintained that home shopping programming is "commercial matter." *See* NAB/MSTV Opp. at 4.

der 47 USC §336(e).

Respectfully submitted,



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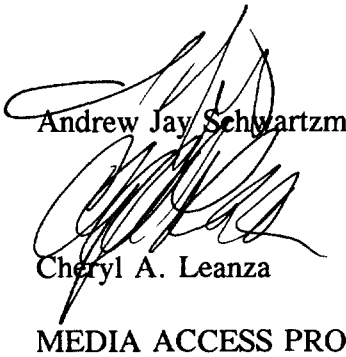

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CERTIFICATE OF SERVICE

I, Gigi B. Sohn, hereby certify that I have this 8th day of March, 1999, mailed by First Class mail, postage prepaid, the foregoing "Reply to Oppositions to Petition for Reconsideration" to the following:

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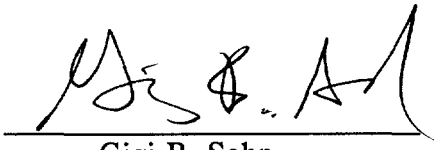

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